THE WANT OF UNIFORMITY IN THE COMMERCIAL LAW BETWEEN THE DIFFERENT STATES OF OUR UNION.

A DISCOURSE

DELIVERED BEFORE

THE LAW ACADEMY

OF PHILADELPHIA,

NOVEMBER 26th, 1851.

BY

JOHN WILLIAM WALLACE.

"It is greatly desirable that throughout all the States of the Union, which to many purposes constitute one extended commercial community, the rules on this subject should be uniform."
Chief Justice Shaw, of Massachusetts, 1 *Metcalf* 47.

PHILADELPHIA:
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1851.

CORRESPONDENCE.

Philadelphia, November 27th, 1851.

DEAR SIR:

Under a Resolution of THE LAW ACADEMY of Philadelphia, passed last evening, it is our agreeable duty to communicate to you their thanks for the interesting and instructive Lecture you then favored them with, and to request at the same time a copy of it for publication.

Permit us also on our own part to express to you the pleasure and profit your discourse has caused us.

We have the honor to remain

Your obedient servants,

SAMUEL C. PERKINS,
WILLIAM ERNST,
STEPHEN REMAK,
HENRY WHARTON,
M. TSCHUDY.

JOHN WILLIAM WALLACE Esq.

December 2d, 1851.

GENTLEMEN:

The members of The Law Academy oblige me by the estimate which they have expressed of my recent effort to answer their request. And in compliance with the desire of their Resolution, which you communicate to me in terms so courteous, I have the honor to send a copy of the discourse which I made before them.

With great truth and respect,

I remain, gentlemen,

Your most obedient servant,

JOHN WILLIAM WALLACE.

To SAMUEL C. PERKINS,
WILLIAM ERNST,
STEPHEN REMAK,
HENRY WHARTON, and
M. TSCHUDY, Esquires.

DISCOURSE.

GENTLEMEN OF THE LAW ACADEMY:

Had I supposed that the chief value of the present meeting would consist in what the lecturer had to say, I should hardly have felt willing to accept the invitation that brings me before you. But an occasional dissertation forms part of the arrangements of your institution: and I regard the regulation as providing an occasion, valuable more as a commemoration of union and fellowship, than on account of any discourse which you are likely to hear.

One useful result of your Academy I take to be that—beginning at the right place, the education of the Profession—it is naturally tending to give something like incorporation to our Bar. Its printed records show that it brings and keeps together as "Associated Alumni," all who have received professional improvement for some years past, from its instructions and exercises. The influence, as yet, is not strong, but so far as it goes it is good. It is well for us to assemble sometimes when we suspend the encounter of our minds, the strife of our interests and the ardor of our passions; not always to meet for trials and for testimony, for arguments and for audits; to know our Profession as something besides a service and a livelihood, and its members in some other relations than as colleagues or antagonists.

I regard it as a matter of regret that no where in the United States has our Profession any Institutions that supply the benefits imparted in Great Britain by those venerable colleges of the Law, which, through so many generations have kept the Bar of England together, not only with untarnished honor and elevated dignity, but in delightful fellowship, and with the sense, and in the power of Unity. I refer, of course, to their Inns of Court. Some of you have probably visited them, and witnessed personally their valuable, though silent influences on the Profession. Others will perhaps better understand what I mean if I describe one of these Foundations.

There are three principal Inns situated not far from each other; Gray's, Lincoln's, and The Temple. The Temple is perhaps the largest, and I select it for description. It is situated in the most ancient, populous and busy part of London. If with us you should suppose a site—say from Market to Walnut street, and sloping gently from Third street to the edge of the Delaware—you would have some idea of the site of this Inn, in relation to the other parts of the city. Around the three sides of its site are built connectedly, and with more or less irregularity, the continuous structures which make the Temple. The outside—that is, the parts upon the street—are used for purposes of business; law-booksellers, stationers, and other persons who supply the convenience of the Bar, being among the occupants. It is the inner part—around and upon the square—which constitutes the resort and abodes of the Profession of England. Turning away from the mighty stream of business life which rolls by day and night along the Strand, and entering through an archway that attracts no notice and reveals nothing within, you find yourself, after a short walk, within the Temple close. Here, and in the neighboring Inns, is congregated the whole

Profession of England; and here every student must enter for his education. Many lawyers and judges who are without families, live here entirely, having a house or apartments with offices and servants more or less expensive; living exactly as each man here does in the house he owns. Some occupy "chambers" only, or "offices," as we call them—dining in the Temple Hall, where all students are obliged to dine. In this place you find the *active* members of the Profession, whether leaders at Nisi Prius and the Courts, members of Parliament, of whom a great number are always barristers, or the great law officers immediately connected with the Crown. Here also are those eminent *chamber counsel* whose opinions settle half the concerns of London; and those *law writers*, perfectly known to the *Profession* every where, whose voices, however, are never heard in court, nor their names within the "city." Besides these laborious classes, who give the place its essential impress, there are many lawyers here whose professional relations hang more lightly upon them; men, often very eminent, who choose to limit the extent of their professional services; or men who find their pleasures in the literature of the law—those tasteful barristers "who study Shakspeare at the Inns of Court." With us this latter class is wholly useless and hardly reputable; but in the composition of a large community like these Inns, all have their proper sphere and influence: and while in this place are centred the members of a profession at once the gravest and most intellectual, the keenest and most ambitious, the busiest and most directly connected with the concerns of the largest city of the world, a liberal and delightful air is cast about the whole. The Temple grounds, which break upon you when once within its close, are beautiful. You are aware that the place was many centuries ago the

residence of the Knights Templars, and like Fountains, Netley, Tintern, and other religious houses in England, it was selected and disposed by its founders with comprehensive and exquisite taste. Before you lies the Thames. On its opposite side, above, rise the time honored spires of Lambeth, and in greater distance the swell of the Surrey Hills. The trees and walks and cloistered gardens of the Temple, impress you by their venerable beauty and the air of repose which they inspire to every thing around. "The Temple Garden" makes a scene in Henry VI.,* and the student of *Shakspeare* will remember it as the spot in which the distinctive badges (the white rose and red rose) of the houses of York and Lancaster were first assumed. Here is the Temple Church. An idea of its beauty may be formed by the fact, that £70,000 have recently been expended in its repairs and decoration. Its services are confined to the members of the Inn; and, being thus sustained by male voices only, have a monastic and peculiar air. As the church comes down from the religious order of Templars, it is said to be the only one in London in which no child was ever baptised. In its aisles still lie, under their effigies of stone—mailed, sworded and helmeted—the Knight Templars, whose crossed legs show that they were slain in the Crusades, and who, buried here 800 years ago, now give the Inn its name. Here, too, in later times, have been buried many members of the Bar—Plowden and Selden, Sir John Vaughan, Chief Justice Treby, John William Smith and others—for whose memory the members of the Inn have recorded their affection by enduring monuments. The inscription of Smith's announces that his writings had attracted the applause of countries beyond the Atlantic seas.

* Part I., Act II., Scene 4th.

From the pulpit of this venerable church, Hooker and Sherlock proclaimed to the assembled Profession of England morality yet higher than its own: and since the days of Blow and Purcell, who were both its organists, the choral services have been better performed than in any church in London. In another building is the Inner Temple Library. The structure is not so costly as that of Lincoln's Inn, on which about £60,000 have been expended; but the collection is rich not only in books of Law but in classics, history and every sort of literature that can entertain the genius and tastes of an educated and intellectual profession. In the Great Hall of the Middle Temple, a venerable structure with massive tables and benches that look as if they had defied the wear of centuries, the members and students of the Inn dine. The room is about sixty feet high. On its richly stained windows you see the armorial displays of nearly 200 of the great lawyers of ancient and modern times, including among the latter, those of lord Cowper, Yorke, Somers, Kenyon, Alvanley and Eldon. On the wainscoted walls you have the names of the *Readers of the Temple* for more than two centuries back: and portraits of great benefactors. Here, too, the Bar assembles for occasions of state and festivity, and for ancient celebrations—some very curious—which are still kept up with that instinct of hereditation which belongs to no country but England.

Every where about you—in short, in the names of avenues and walks, in the designation of buildings, in the objects of curiosity or interest or veneration, you have the names and associations of the Law before you. The Profession is here in its corporate dignity and impressiveness. It has about it all those influences which Mr. Burke thought so valuable in the structure of a state. It bears the impress of its name and

lineage, and inspires every where a consciousness of its ancient and habitual dignity. The past is every where connected with the present, and you feel that the Profession is an inheritance derived from forefathers and to be transmitted to posterity.

While many of the members of the Inns are of course engaged away from their Inn daily at the Courts or in Parliament, and in the excitements and toils of business, here they always return as for a "higher conversation:" and when within the Temple close, are as completely sequestered from the mighty world of London that is rolling on without them, as though they were beneath the venerable shades of Oriel or Christ Church, and looking upon the tranquil currents of the Isis before them.

In some senses the Courts themselves are subordinate to these Foundations. A person is admitted to the Bar, not by motion in court, as with us, but by being *called* to the Bar by the *Inn* where he has studied. The Inns, therefore, and not the Courts, regulate the whole subject of admissions to the Bar: and having this controlling power, are in truth the masters of the Courts themselves.

You will readily understand from all this, that these Inns, numbering in all about 4000 persons, are complete communities, with laws and customs and officers. Each Foundation is governed by a small committee called Benchers, selected always from the most influential and eminent members of the Profession. Every member of the Bar lives under restraints in all ways professional. He is surrounded by his professional brethren, and guarded every where by their watchful observedness. A controlling and valuable influence exercises itself upon his professional life, and he could not lose reputation in his Inn, and remain at the Bar at all.

Gentlemen: How wholly without such regulations or influences or unity is the Profession in America! Beginning with his career, a student of law is entered in a lawyer's office: While fitting himself for his profession, he becomes acquainted with no member of it; his preceptor excepted. He is a stranger to his co-students, who are scattered about in the other 324 offices of the city, and they to him; though all are preparing at the same time, for the same profession. When admitted, the only acquaintance which he makes with his brethren—senior, equal or junior—is as he meets them in the service and the conflict of his daily toils! an atmosphere surely not congenial to the growth of intercourse and friendship.

We have in these United States 26,000 lawyers, bound together by no ligament that does not equally bind the practitioners of every trade. In this city we are scattered about in streets and alleys from Kensington to Moyamensing, and from Second street upon the Delaware to Fourth upon the Schuylkill. The only printed list of the lawyers in this city that I know of, is to be found in a "*Business* Directory." No one knows, or can know—or desires to know—half his own brethren; and more than once, members of the Bar have been convicted by law of offences, when, I suppose, if we told the truth, no one of the remaining 324 among us, felt that either he or the profession had received any "bodily wound." With lawyers collected every where, the associated Bar exists no where. In this city, I believe, it never professes to exist corporately except when some lawyer dies. Then a dozen or fewer of his friends, entitling themselves The Bar, pass "the usual resolutions;" upon every one so much alike, as to have made the whole matter a ceremony, which is sometimes a scandal and sometimes a jest.

With some advantages, all this I think is in many respects

unfortunate. It has tended and is tending to the disrepute and deterioration of our Profession. In a country like ours, full of talents, in a profession open to every body, there is need of a strong hand of purity upon it, to prevent its being as much a plague as a benefit to the community.

In its instrumental parts, our Profession is concerned with the passions, the differences and disputes of mankind. It lives on the errors of man's conduct and the infirmities of his nature. And hence men who are habitually meddling, bold, subtle, active, of litigious dispositions and unquiet natures, find in it the finest field for the exercise of their low chicane. Such men of course are ever ready to seek the law as their profession. Their existence in it depends upon whatever makes property questionable, ambiguous and insecure. Their fortunes are made by those profligate speculations which follow the overthrow of regular concerns; and great social disasters are to them the sources of affluence and infamy. They become the fomenters and instigators of litigation, and being generally converted, by the contingent terms of their compensation, from advocates into parties, are ready to sacrifice the honor and decency of the profession—which they understand not at all—to their private gains, which, with the practical sagacity common in low minds, they understand always too well.* The danger of our Profession being over-run with these men, is particularly great in this country where the titles to much of our new lands are unsettled; where there is neither army nor navy to engage aspiring talent, and where, from the absence of any bankrupt law, we constantly see vast mercantile concerns thrown into voluntary assigneeships, which do little but make a stock in trade for these disreput-

* See all this matter finely put by Mr. Burke in his Reflections on the Revolution in France. I have quoted much of his language.

able hunters after "*jobs.*" The class, however, is naturally generated every where in some of the practical parts of the law. The old French Bar, though distinguished by so much that was great and imposing in judgment and in advocacy, was really destroyed by them; and in the great numbers of them which found their way into the States General of France, Mr. Burke predicted distinctly, and nearly as it all happened, the confiscation, pillage, sacrilege and bankruptcy which attended the French Revolution. THE BAR OF ENGLAND knows the danger of them, and, considering the temptations which a practice of the law offers to the restless, active principle of talents, she entirely separates the practitioners of the instrumental part of her profession from those who deal with it in the abstract and intellectual departments. She will not tolerate that her barristers dishonor Justice by the sulliage of bargains, by chaffering with clients, by becoming interested in recovery or making compensation dependant on success. The fees of the barrister are settled by others than himself, and are brought to him by the attorney with his brief. It is his professional *character* and his interests, not in the particular case, but in all his cases, and in a large and honorable regard, that is expected to inspire his zeal, his efforts and ability: and the client, if he looks not to this, looks to nothing. How thoroughly it *is* this which settles the success of men at the English Bar, you may infer from this fact, that no examination at all is required for being called to it. Dining a certain number of times at the Inn, is all that practically is needed: and thus while, theoretically, the Bar is open to all the unprincipled and ignorant men who choose to enter it, practically no man finds it worth while to enter there who cannot inspire confidence from the Profession in his ability, learning and entire honesty. There are some disadvantages in all this:

and much of what I have described, cannot of course exist with us. At the same time, I am persuaded that the structure and regulations of the Bar from which we derive our origin, are founded in deep English sagacity, in a provident foresight of the nature of our Profession, of the temptations which beset its practitioners, and the disrepute which, when absolved from the restraints of a strong moral discipline, is sure to attend it in every country.

Gentlemen: In our Law Schools and Law Academies—beginning with the great Institution at Harvard, which is assuming a national reputation and strength, and passing to others, like your own, more local in its character—I suppose that the Profession must seek, if it is to seek them at all, for such influences as, with increasing numbers and extent, I think it is beginning to want. In these seminaries, and with students of the law, must germinate, perhaps, the seeds which, as students become Practitioners and Authorities, will grow up, and bring forth fruits of value.

But I have detained you too long with these remarks, meant as preliminary to the subject of my lecture, THE DISCREPANCIES OF OUR HOME COMMERCIAL LAW.*

Internal commerce is the distinguishing characteristic of our country. In no other country is it so prominent, so universal, so profitable and honorable an engagement. England is commercial, but her commerce is more with foreign nations. Besides which the whole spirit of trade is held in check by the institutions of the country, and by the vast wealth in

* It ought perhaps to be stated, that some of the illustrations in the present discourse, are taken from an article by me in the 1st vol. of Hazard's United States Register, p. 53.

hands which give it a very different and somewhat antagonistic influence. With us the very constitution of government had its origin in the commercial necessities of our country and of our different States. It was laid in a spirit of comprehensive commercial policy every way, but specially so in regard to our relations to each other. And while in very much of all that concerns us we remain independent States, it has made us but one country, not more in regard to foreign Nations than it has in all that belongs to our commercial intercourse and dealing with each other. We have canals, railways, telegraphs, rivers, post-roads, post-offices, and expresses—running over a continent, all our own—such as belong to no other nation upon earth. Our internal relations are intimate and active, easy and cheap, to an extent unparalleled in the countries of Europe. Detained for no passports, unladen for no duties, we travel from regions where the exports of the country are its ice and its furs, to climates where the orange and fig and pomegranate are in perpetual bloom. Through all this vast region we are under one flag; we exchange one currency, and we hear no language less familiar than our mother tongue. Nothing on earth is like this. Nothing on the eastern continent can ever resemble it. And I do not doubt that the Liverpool Chronicle asserts with perfect truth that the aggregate inland tonnage of the United States is probably not inferior to the aggregate inland tonnage of all the other countries in the world. We find as a consequence of our internal communications, a perfect fusion of commercial interests and arrangement over the whole country. The same house exists sometimes under one name, sometimes under different names; not only in adjacent cities, but in those removed from each other by the width of a continent. Men live in summer in the North, and in winter in the South: and

New York and New Orleans have become to many persons homes indifferently. Even our foreign commerce is transacted by our cities through each other. Philadelphia sells her bills in Boston, New York and Baltimore; imports to New York; exports from Charleston, Mobile and Louisiana. So other cities. All aid, depend upon, and are connected with each as thoroughly, with as much closeness, and as completely in different States as in the same State. I know no difference at all in the nature of the relations between Philadelphia and New York, and those between Philadelphia and Pittsburgh: and in commercial intercourse no man, I suppose, distinguishes them, even in thought, as being, the one in a foreign State, the other in his own. Most important is it, then, that the law under which so vast and so various, but so connected a business, is carried on, should be uniform; that a contract made in Philadelphia, so as to be binding there, should, if made in the same way at New York or Boston, be binding there also; and that acts which render a man secure in the city where he lives, should have the same effect in those in which he is constantly doing business. Let us look how far this uniformity of law exists between these United States.

1. *In the law of Mercantile Guaranty.* One man frequently contracts with another, to answer for the debt of a third person. In Pennsylvania, where this part of the Statute of Frauds is not enacted, the contract may be verbal and will be binding as if written. In Massachusetts, where the statute exists, the promise of the guarantor, under the interpretation which Massachusetts Courts have given to the statute, must be in writing, but the consideration for it need not be in writing. In New York, the statute is construed differently, and not only the promise to pay the other person's debt, but also the consideration for it, in other words, the whole contract

must be in writing.* Here, then, in Philadelphia, New York and Boston, the three great cities of the north, we have three discordant rules upon one of the commonest of commercial engagements! A Philadelphia merchant who had often secured doubtful debts by the verbal engagements of another, goes to Boston, to secure such a debt there; and does it precisely as he would do at home, and loses his debt on that account. The next time, he takes professional advice and has a form of guaranty drawn up by the ablest counsel in Boston; and, no longer trusting to the verbal engagements of Pennsylvania, he makes his New York surety sign the same promise that he found so efficacious in Massachusetts, and, in so doing, loses his debt, because he has failed to do something more.

This is by no means all. The next time our friend has a contract which is binding in all the States, and is content. But if he has occasion to use it, he will find that, though binding alike in all the States, it binds in quite a different way, upon very different conditions precedent, and to very different benefits in the end. For example: Merchants constantly send to each other letters of guaranty in favor of their friends, making themselves responsible for advances which may be made to such friends. The Supreme Court of the United States has laid it down as a rule of commercial law, that to be binding, notice must at once be given of the acceptance of this guaranty, and notice of the advances as they are subsequently made under it. That court throws the duty and labor of information as to what has been done, on the person who receives the letter, and quite relieves the sender. This rule in its exact extent prevails, as of course, and by the mere

* 3 Kent's Commentaries 122, 123.

force of authority, in all the Circuit Courts of the United States. And the same general rule has been adopted in the State Courts of Pennsylvania, Ohio, Missouri, South Carolina, Kentucky, Massachusetts, Connecticut and Vermont. But being adopted, not as one which is binding from the decision of the Federal Courts, it has been arrived at, in different States, by different trains of reason, and while existing as a rule nominally the same, it exists under modifications which make it not always identical in principle, and often very far from identical in application. On the other hand, the rule being one which does not exist in any shape in the commercial country of England, and one which has been sharply attacked even in the States where it prevails, New York, the most commercial State of the whole Union, rejects it altogether. She holds that the contract is complete and the liability of the guarantor under it absolute, as soon as the goods are delivered in accordance with the request; that no notice need be given either of the acceptance of the guaranty, or of the furnishing of the goods under it. *Caveat guarantor* is her maxim: and if the guarantor wants to know what has been done in pursuance of his own authority, she holds that it is his business to inquire. Other States have never yet declared any law upon the subject.

But again, after all these matters have been disposed of, and notices given within a time and in a manner unexceptionable every where, you are still as far from uniform rule or certain right, as ever. In New York, New Jersey, Vermont, Connecticut, South Carolina and Mississippi, you may sue your guarantor on the failure of the principal to pay, without any demand of the latter or notice to the former. The Supreme Court of the United States holds the law to be different from what those States do, and that you must make

demand of the principal and give notice to the surety. And the rule is the same in the State Courts of Massachusetts, Indiana and Maine: While Pennsylvania, Delaware, Alabama and Missouri proclaim a rule different from all these others, and hold that you cannot touch the guarantor unless you have first pursued the original party to insolvency. Hence while in the six States I have first named, you may sue your guarantor on the mere failure of the other party to pay, and recover, you would wholly fail if, under like circumstances, you sued him in the remaining seven, or in the Circuit Courts of the Union any where. The contract which, in the first named States is primary, and means that the guarantor will pay on the first omission of the principal to do so, is secondary in one way in those next named and over the United States collectively, and means that he will pay after demand has been made in vain of the principal and notice given of it: and it is secondary in a different, and very alarming way, in those last named; and in them means, that the guarantor will pay only after all the remedies of compulsive justice have been put in operation against the principal and found vain.* This is the difference in law. The difference in fact is, that while in some States your remedy is so simple, prompt, and easy of enforcement as to be of value, in others it is so dependant, slow and difficult of enforcement, as to be worthless. While these great discrepancies prevail in the States I have enumerated, the law in them is at least settled; while in the remaining States of the Union, or most of them, the law has never been decided at all. They have no law on the subject: and thus while it has been several times over

* See all these discrepancies pointed out, 2d American Leading Cases 50–99. Of course I do not go much into details. And see also 1st Wallace Jr. 149, and cases there cited in argument.

settled in the Supreme Court of the United States, and in the courts of many individual States, in the remainder of them it is to be gone into as if it had never been decided any where.

Take a second case. A foreign bill of exchange, payable so many days after sight, must be presented to the drawee for acceptance. If acceptance be refused, the law of Massachusetts, Connecticut, New York, Maryland, Virginia and the two Carolinas require that the bill be protested for non-acceptance, and notice given.* The same rule was laid down by Judge Washington, in this the Third Circuit;† but the Supreme Court of Pennsylvania has decided‡ that protest and notice of non-acceptance is unnecessary. If, therefore, a merchant of Philadelphia draws a bill on Europe, in favor of one of New York, who endorses it, and remits it to his foreign correspondent and the bill be refused, and at maturity protested for non-payment and notice given, the holder cannot recover against the New York endorser, because of want of protest, and notice of non-acceptance; but he *can* recover against the Pennsylvania drawer, notwithstanding the want of both. But this is not the worst. Suppose that the bill is drawn in New York and endorsed in Philadelphia; the holder can recover against the Philadelphia endorser, but when that endorser resorts to the New York drawer, he cannot recover, because no protest was made, and no notice given!! Hence no Philadelphia merchant is safe in endorsing a bill drawn in any other State; as he may be compelled to pay it as endorser and yet fail to recover it from the drawer, on account of an omission made by a third person, and which the Philadelphia merchant could not help.

Take a third case. The Law of Average. I will take a

* 3 Kent's Commentaries 95. † 4 Washington 464.
‡ 6 Sergeant & Rawle 356.

case which actually occurred during our last war with England. The schooner Julia sailed in February, 1813, from Bordeaux for this port, which, when she arrived, she found blockaded by a British Squadron. In consequence she bore away for New York, and was chased by vessels of the enemy. A British seventy-four, which was cruising along the Jersey coast, joined in the chase, and when the Julia got as far as Long Branch, she was headed by another vessel of the enemy. Thus surrounded, and almost certain of capture, the captain, on consultation with his crew, determined to run her ashore at Long Branch. In doing so, he must injure, perhaps lose, the vessel; but the cargo, or part of it would be saved, and perhaps the vessel got off. The vessel was entirely lost, but a great deal of the cargo was saved. Now by the law of New York, as decided in their Supreme Court, the cargo that was saved, was *not* bound to contribute to the loss of the schooner, by way of general average.* By the law of Pennsylvania, as decided in our Supreme Court, it *was*.† Judge Washington, who decided the case in the Circuit Court, decided that it *was*.‡ And such, by a recent decision of the Supreme Court at Washington,§ is now the law in the nine Federal Courts. Here, then, supposing (as may have been the fact), that some of the cargo belonged to New York merchants, if the owners of the schooner brought suit for contribution against the owners of the cargo, they would recover against such as they sued in a Pennsylvania Court, and fail against such as they sued in a New York Court; or if the ship-owners retained the goods till contribution should be made, and thus compelled the owners of the cargo to contribute, the ship-owners would

* 9 Johnson 9.
† 2 Sergeant & Rawle 229.
‡ 3 Washington 298.
§ 10 Howard 270.

be safe, so long as they remained at Philadelphia; but if any of them went to New York, and suit was brought against him there, he would have to give them up without any contribution; or if contribution had been previously made by the New York owner, in order to get the goods, he would recover the sum from the owner whom he caught at New York.

A fourth illustration may be found in the Statute of Limitations. Six years is the limitation for suits on promissory notes and book debts, in Pennsylvania, New York, Connecticut, Massachusetts, and most other States of the Union. In Maryland and Delaware, it is three. In New Jersey, it is four. A Pennsylvania debtor, by note or book account, whose debt is more than three years old, removes to Baltimore or Wilmington, and effectually bars his creditor from recovering the debt by suit against him. This very fact has occurred within my knowledge.

Take a second case in Average. The New York rule is, that where a general average has been settled in a foreign port, and a shipper obliged to pay his portion of it, he may recover, if he be insured, from his insurer, what he has been thus obliged to pay, though it be much more than he would have had to pay, if the average had been adjusted according to the rule of the home port. The rule of Louisiana is different; the manner in which the average would have been settled in Louisiana, is the extent to which the Louisiana insurer is bound.* Now suppose that A. of New York, ships at New Orleans for Hamburgh a quantity of cotton. B. of New Orleans ships the same quantity, on the same vessel, on his own account. A. insures his at New York. B. insures his at New Orleans. Both are consigned to the same persons; both are exposed to the same risks; both pay the same pre-

* 2 Phillips on Insurance 256.

mium. Something happens during the voyage which, at Hamburgh, is considered an average, but which is not so considered either at New Orleans or New York. The ship-owner or captain will not give up the cotton, until the consignee pays his proportion of the general average; to get the cotton, the consignee does so, say for each merchant, $ 1000. The New York merchant sues the company which insured him, and recovers. The New Orleans merchant sues the company which insured him, and fails: Or, supposing that both were insured in New Orleans; the citizen of Louisiana, who must sue in the State Court, will fail; while the citizen of New York, who can sue in the Federal Court, may recover.

The inconvenience, injustice and loss in the damages on *protested bills of exchange*, is a well known, serious and most practical evil. They are illustrated in the decision of *Watts* vs. *Atterbury*,* by our own Supreme Court. In that case our court laid down the general position, that the contract of acceptance of a bill is local, and that interest for the breach of it, is to be computed at the rate of the place where it was to have been performed; and accordingly, that no matter how heavy damages a drawer in another State may be obliged to pay on account of the acceptor's breach of contract, that acceptor is bound but for legal interest of his own State. The plaintiffs in that case, therefore, after having been forced to pay *thirteen* per cent. in consequence of the defendant's breach of contract, had to content themselves with receiving from that defendant less than half the sum.

In the above instance the advantage is in favor of Pennsylvania; while between Pennsylvania and Virginia, there is not a less striking difference against us. In Virginia, when a foreign bill is returned protested, the maker and endorsers

* 2 Hazard's United States Register 416.

are bound but for *ten* per cent. damages. With us, as we know, the damages in such a case are *twenty* per cent. Large amounts of bills drawn and endorsed in Virginia, are sent to this market for sale: but if a Philadelphia merchant put his name on it, he may be made to pay twenty per cent. damages, and yet can recover from the Virginia drawer or endorsers but *half* the amount. In 1837, very large amounts of foreign bills returned under protest, were settled by Virginia drawers or endorsers at ten per cent., when, just before, the Pennsylvania endorsers had taken them up at twenty.

These are but two cases out of very many. Between some of the States, there is a variation of as much as *fifteen per cent.*

A bill is sometimes endorsed in two or three States. The last endorser takes it up, paying what the law of his State requires. He may then select a prior endorser, residing in a State where heavy damages are given on protested bills, and make a clear profit of from seven to twelve per cent. The maker finally takes it up, and when he comes upon the non-paying *acceptor, the "primal, eldest" cause of all the difficulty,* he can recover but a half, or it may be, a third of what, on account of that acceptor's breach of contract, he (the maker) has been obliged to pay. The effect of such a system is to check commercial intercourse, by restraining the drawing or endorsing of drafts, unless the whole subject is confined to a single State. A Natchez merchant, for example, would not draw a bill on Pennsylvania, nor would a Philadelphia merchant endorse a Virginia drawn bill, if either party knew to what risk he exposed himself.*

* The French law is much more equitable than ours. It is there laid down, as a general principle, that the acceptor of a bill of exchange, by his acceptance, fixes upon himself an unity of interest and obligation with the other parties, and he is bound to pay principal, interest, incidental expenses and damages, in the same manner that the drawer is bound to pay them.

In some States—New York, Pennsylvania and Rhode Island—Statutes have been enacted, and factors may pledge. In others, being left to the Common Law, they can do no such thing.* In a South Carolina *State* Court, a joint obligor surety, discharged at law, may be held liable in equity.† In a South Carolina Federal Court, the same surety on the same surety, can't be pursued any where.‡ In New York, Pennsylvania and Mississippi, the maker of a note becomes liable to suit on one day: In Massachusetts, Maine, New Hampshire, South Carolina and Tennessee, he becomes liable on another:§ In the remaining States, nobody knows when he becomes liable; while every one knows that the obligation of the endorser to pay, depends on an application to the maker *on the right day.*

To end these illustrations, I refer to what has lately happened in respect to a question which arises every day in commerce, and about which, therefore, the law ought, beyond all doubt, to be uniform; I mean whether *a person taking a promissory note for an antecedent debt, will hold it free of equities and defects of title.* This is a mere question of general commercial law. It depends on no local statute. It is influenced by no local usage. The Supreme Court of New York, differing from the Courts of Pennsylvania, Massachusetts, Connecticut and of some other States, has long and often decided that a note so transferred, is not held as for value, and without notice. Tennessee has followed her. The Supreme Court of the United States has decided the exact contrary to them both: and this binds in all her Circuits. But New York adheres to her decision. Each court declares that a question of general commercial law is to be settled on gene-

* 2 Kent's Commentaries 626–628. † 4 Desausure 148.
‡ 9 Howard 83. § 1 Metcalf 55; 1 American Leading Cases 406.

ral commercial principles: each, on these points, holds the decision of the other to be of no authority, and, professing to be guided by the same chart of general mercantile jurisprudence, they find themselves, after a circumnavigation of the whole system, anchored at the opposite poles of the law. The practical effect is obvious. A New York merchant who, having a taste for fresh air, chooses to reside on the Jersey side of the Hudson, and may so sue in a Federal Court, will recover; while, on the same note, and on the same facts, his brother merchant who, liking the Opera better, resides in the city proper, will fail. A later endorsee will recover of an earlier, while, that earlier who, by process of the Marshal, has been forced to pay, will (with equal equities and as much law), fail to recover of any body.*

What I have stated forms an inconsiderable—a very inconsiderable part indeed of the discrepancies which exist among us in respect to our commercial law. I adduce the instances I cite as illustrations only.

How then do these evils arise?

In a slight degree, from legislation, but principally from the decisions of our State Courts. Each State has its own courts, and the decisions of one State are not binding on another. The United States has its courts, but their decisions are not binding on the State Courts, nor those of the State Courts on them. Neither are the decisions of the Supreme Court of the United States binding on the State Courts, except in a very few cases—not commercial. The Supreme Court of the United States has declared that on commercial questions it will not follow the State Courts: and the State Courts in turn declare that on such questions, they will not

* See 16 Peters 1–24; 6 Hill's New York 93; 1 Barbour 225; 10 Yerger 429; 1 Humphreys 468; and 1 American Leading Cases 335, 347.

follow the decision of the Supreme Court of the United States; and both have a constitutional right to say so; for both are courts of final and co-ordinate jurisdiction. With such causes of discord, it is remarkable that so great uniformity exists. The evil, however, is increasing and must continue to increase. The Constitution gives the Federal Courts power to decide cases between citizens of different States; and formerly great numbers of commercial cases were decided in those courts, which, though not binding as authority on the State Courts, were every where known, and to a good extent followed. But the system under which these courts were hastily established in 1789, and still remain, has become entirely too small for the country: and, in many circuits—though not in ours—the list is so burthened with cases that can be tried in no other courts—admiralty, revenue, and post-office appeals; cases of offence on the high seas, or other offences against the United States, and, most of all, with *cases relating to the infringement of patent rights*—that while the same jurisdiction over commercial cases exists, constitutionally, as of old, practically it is not at all so exercised. The decisions of the Supreme Court of the United States instead of being referred to for the commercial law of the country, are hardly known to the profession, now, except as settling patent, admiralty, or revenue cases, as reviewing the opinions of State tribunals on constitutional questions, and as containing the great practical exposition of the powers of the State and National Governments. All questions of commercial law go, therefore, to the State Courts. New courts are created with new States. No one State Court can be acquainted with the decisions of its sister State Courts even if it sought to be guided by them. No judge or lawyer owns or professes to

own, or, if he did own them, would have power to read, the Reports of all our thirty-one States. It is no disparagement to say that a vast portion of all their contents are worthless to him. They relate to subjects connected with the domestic relations, with real property, and such local matters as it is well should have and keep their centre within the smaller orbit of their proper State.

The case is widely different with regard to our commerce. Its centre is every where. Its orbits infinite in number; most various in circuit. It goes over the whole country more even than the grand rivers, roads and ways on which it is transacted. Inter-commercial in this united way, our law is essentially defective, when our people shall be safe in their business, while they are on one side of a river or surveyor's line, and not safe if they step across it; shall hold their debtor tight, if they can sue him here, and hold him not at all, if they must sue him there; shall find that justice as laid down in some State Courts, is injustice as laid down in other State Courts; and is not known as either in a court of all the States—The Union; where a person who can recover during his debtor's life, because that debtor lives at Philadelphia, will fail to recover of his executor, because *he* lives at Camden: where in the North, professing the principles of the English common law, a merchant shall have a contract interpreted in one way in Pennsylvania, another way in New York, and a third way in Boston: and when he goes South with it next week, shall find it open to new constructions;—in Florida, by the Partidas of Spain; in Louisiana, by the Code Civil of France, and in Texas and California, by something which is neither and both; half code, half custom; Mexican and mongrel!—where, in fact, law is a science of *geography*, almost as much as of *justice*.

How then is the evil to be remedied?

So far as the discord is the result of legislation, it might, I suppose, be remedied by application to the legislatures which caused it. So far as it is the result of judicial decision upon the same statutes, or upon what is commercial common law, uniformity could be produced throughout the entire country, *by giving in all commercial cases, a writ of error to the* Supreme Court of the United States from the State Courts; but this could not be done without an alteration of the Constitution.*

A degree of uniformity might be obtained in another though less safe a way. By the Constitution of the United States,† Congress has power "to regulate commerce with fo-

* I take it to be plain, that before many years the whole system of our Federal Judiciary will have to be remodeled. "The country," says Mr. Webster, "has outgrown the system." As early as 1793, the system hastily prepared in the summer of 1789 was found to be impracticable. We changed it then: we changed it again in 1801, and again in 1802: and, without any radical change from the earliest plan, and hardly any in detail from that of 1802, have been constantly endeavoring by different expedients, to make it more and more suited to the extension of the country, and to the vast increase of its business and population since. It is of course not surprising to find that a plan made in 1789, even improved as it was in 1802, should not have contained a principle of developement adequate to the exigencies of the country as it actually exists a half century afterwards: doubled in size of territory, more than thrice doubled in population, and multiplied almost beyond power of estimate in wealth, and in extent, variety and importance of commercial business. Accordingly, hardly a session has passed for thirty years, that an attempt has not been made to produce some change in our national judicial arrangements, and although different plans have been presented, the inherent difficulties of the matter have prevented any efficient relief. (*See Mr. Webster's Remarks, in the House of Representatives of the U. S., Jan. 4th*, 1826.) The old organization has therefore remained until the grievance has become extreme; as is perfectly illustrated, among other instances, by the costly, vexatious and wholly inadequate relief afforded in those cases which chiefly occupy the Circuit Courts—I mean cases of infringement of patent right. A radical change must be made soon, and whenever it shall be made, the matter of *Uniformity in our Commercial Law* ought, I think, if possible, to receive consideration.

† Article I., Sect. viii., § 3.

reign countries, *and among the several States.*" Under this provision, a code of commercial law might be framed uniform throughout the United States. It was thus that the famous Hanseatic code was formed. No less than eighty-one towns on the shores of the Baltic, and on the large German Rivers, assembled in convention and agreed upon a code, which at this day, now 300 years from its date, is a compilation of authority. But this codificated jurisprudence, like every other system of which the execution is separated from the plan, is difficult to form and dangerous in application. We should probably very soon feel the truth of Chief Justice Gibson's remark, that a system complete in all its parts, could not be struck out at a single heat by the most able law-giver that ever lived.* Neither would this secure uniformity, so long as thirty-one courts, each authoritative within its sphere, would decide upon the meaning of the code.

A third remedy for this embarrassment is to be sought within the States themselves. A judicial declaration of the State Courts, that on questions of commercial law they would regard the decisions of the Federal Judiciary as of binding and superior authority, would do much to produce a harmony which now exists not at all. It could safely still be made. Not involving titles to land, nor now to property of any kind which could be disturbed by it, State decisions,

* 8 Sergeant & Rawle, p. 378. "Laws," says Sir James Mackintosh, "must in all countries arise out of the character and situation of a people. They must grow with its progress, be adapted to its peculiarities, change with its changes and be incorporated into its habits. Human wisdom cannot form such a constitution by one act; for human wisdom cannot create the materials of which it is composed. . . . . There is but one way of forming a civil code either consistent with common sense or that ever has been practised in any country, viz. that of gradually building up the law in proportion as the facts arise which it is to regulate." (*Discourse on the Study of The Law of Nature and Nations. London*, 1835, *pp.* 66, 75.)

however long ago decided, could be changed at any time, without injustice; and in order to secure a more comprehensive and national kind of justice, might be changed without discredit.

A uniformity in our home commercial law, is closely connected with "that unity of Government which constitutes us one people;" with that Union on which rest "all our animating prospects, all our solid hopes for future greatness." The Constitution fails in that which was, alike, one great motive to its origin, and one great argument for its adoption, when the merchants of the country who are transporting its natural products and its manufactured industry over the face of the whole land—knowing, in this, no north, no south, no east, no west, nothing but the Union—are at the same time living under forty different codes of commercial *law*.

I have seen in the Courts of England, its robed and venerable judges bending forward as they listened, on commercial questions, to the laws of Rhodes, a little island; the laws of Oleron, an island smaller still; the laws of Wisby, a dreary town of the Gothland seas. But I waited in vain to hear of the commercial law of my own free, great, *commercial* country. And why? It was because no man can say that such a system exists. The Commercial Law of the United States, if it exists at all, exists only as a system which the courts of every State in the Union may constitutionally disapprove and reject. Or it exists only as a *balance of State decisions*, often diametrically opposed, always local in coercive authority, and oftentimes so poised in weight and number, as to leave nothing at all, even local, in intellectual influence.

Gentlemen: We have in this country the Supreme Court of the United States. There exists not upon earth; there

never has existed a tribunal with powers so various, so great and so imposing. From that court, in some way—and under some organization of it—the nation should derive authoritatively a system of Home Commercial Law. The embodied judgments of such a tribunal, reviewing, revising, reversing or confirming the commercial decisions of States, in last resort, and, after argument, deliberation and judgment, pronouncing its decrees—as well for the country and for science, as the parties—would form a jurisprudence worthy of this nation's commercial greatness. What, in comparison to the respect which such a system might inspire to every commercial tribunal throughout the earth, would be the Law of Rhodes; The Consolato Del Mare; The Rota Decisions of Genoa, or the commercial customs of Amalphi? A Commercial Jurisprudence, laid in the spirit of our Constitution, in the depth of abstract justice, scientific law and experimental wisdom, and regulating, by rules at once uniform, enlightened and authoritative—embracing all varieties, and flexible to all advancement—the domestic commerce of these United States of America, would, in my opinion, be worthier far of homage than all the codes of Europe; for it would regulate a commerce different from any, and greater than any which Europe has ever known. All that Europe has most comprehensive in commercial statesmanship, or sober in judicial wisdom, might find in it their highest rule; their guide of policy and their proof of law. It would be a monument to cast its light to distant ages: and in a system of commercial jurisprudence which governed "a nation of nations, a sovereignty of sovereigns," we should feel the truth of lord Mansfield's declaration, that the Law Merchant is part of the Law of Nations—the Public Law of the civilized world.